THAG SERVICES INC. (M) SDN. BHD.

v.

CAPITAL INSURANCE BHD.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. D2-23-3576-87]
13 MARCH 1989

CIVIL PROCEDURE: *Summary judgment for full insured sum - Appeal on quantum of damages - Sought to adduce fresh evidence - Events happen after summary judgment has been given in favour of the plaintiff - Circumstances when fresh evidence can be adduced - Grounds for objecting the admission of fresh evidence - Fresh evidence - Fresh evidence admissible.*

INSURANCE: *Valued or unvalued policy - Liability not disputed - Summary judgment against insurance company for full insured sum - Appeal whether plaintiff entitled to recover full insured sum - Quantum of damages recoverable under the policy.*

Plaintiff insured his motor vehicle against loss or damages to the vehicle through *inter alia*, theft in the sum of RM100,000. The car was stolen during the currency of the policy and the plaintiff demanded payment of the sum insured of RM100,000. The defendant admitted liability but dispute the quantum on the grounds that the policy is an unvalued policy and the quantum of actual loss of the vehicle at the date it was stolen should be between RM68,000 to RM73,000. Plaintiff obtained summary judgment for RM100,000 of which the defendant sought to appeal against. At the hearing of the appeal, the defendant also applied for fresh evidence to be adduced which in effect provide the defendant with an alternative defence of abatement. The fresh evidence sought to be adduced is the positive identification of the vehicle after summary judgment had been entered against the defendant. The plaintiff disputed the introduction of such evidence on the grounds that the defence of abatement which the defendant sought to plead upon allowance of such fresh evidence makes no difference to the outcome of the plaintiff's claim as the defendant had admitted liability and the only issue before the Court being the quantum of damages.

Held:

[1] In an application for leave to adduce fresh evidence, the Court has an absolute discretion whether or not to grant leave and the exercise of such a discretion is guided by the facts of each case.

[2] In the instant case, the following conditions need to be fulfilled before leave to adduce fresh evidence can be granted:

(a) That the evidence sought to be adduced could not, with reasonable diligence, be obtained at the O. 14 application.

(b) The fresh evidence will have an important bearing on the outcome of the case.

(c) The fresh evidence is credible.

[3] Conditions (b) and (c) are conceded by the plaintiff and in respect of condition (a), the defendant is not at fault for not seeking expert services earlier or lack of diligence during the adjournment of the O. 14 application. The plaintiff and the police were given the opportunity

to make positive identification of the vehicle but they too failed in their attempts as all identification marks of the vehicle had been tampered with.

[4] On the facts of the case, it is just and equitable that new evidence disclosed by the report of an expert Forensic Services be allowed to be adduced in Court after summary judgment had been entered against the defendant.

[5] The policy is an unvalued policy and the amount of indemnity that the defendant had agreed to be bound should not exceed RM100,000 and the measure of damages due under the policy in the event of any loss or damage, must be the value of the vehicle at the time of such loss or damage which does not exceed the insured sum.

[6] Upon the recovery of the lost vehicle, the defendant is not entitled to the defence of abatement but shall nevertheless be liable to the plaintiff for damages. The measure of such damages shall no longer be the value of the vehicle at the time of its loss but governed by the policy which empowers the defendant to repair of reinstate or replace any parts or accessories stolen to restore the vehicle to its condition before it was stolen.

[7] The appeal was allowed with costs to the extent that the defendants are only liable to meet all necessary costs to bring the vehicle into good repair and to restore it to its original condition as it was at the time of theft. An adjuster to be agreed upon by the parties for the purpose of assessment of damages and cost of employing such an adjuster to be borne by the defendant.

[Appeal allowed with costs.]

For the defendant/applicant/appellant - C.S. Kumar; M/s. Sri Ram Zulkifly & Kumar
For the plaintiff/respondent - J. Marbeck; M/s. Yusuf Lee Pathma & Marbeck

JUDGMENT

Siti Norma Yaakob J:

On 7 May 1976, the plaintiff insured their motor vehicle, a BMW 728i, bearing registration number BCF 8118, with the defendant, wherein on consideration of premiums paid, the defendant undertook to indemnify the plaintiff, against loss or damage to the vehicle through *inter alia*, theft, in the sum of RM100,000.

The vehicle was insured for one year and during the currency of the policy, the plaintiff reported it stolen on 23 February 1987 and demanded payment of the RM100,000 being the sum insured from the defendant.

The defendant do not deny liability but dispute the quantum claimed on the grounds that the policy is an unvalued policy and that the sum of RM100,000 was only the plaintiff's estimate of loss and they maintain that the quantum of actual loss to the plaintiff should be the market value of the vehicle at the date it was stolen which they place between RM68,000 to RM73,000.

The plaintiff succeeded in their O. 14 application for summary judgment for RM100,000 and the further proceedings that followed was an appeal against that order.

However, at the hearing of the appeal, the defendant had also applied for fresh evidence to be adduced, the effect of which is to provide the defendant with an alternative defence of abatement, which was never pleaded before.

The fresh evidence sought to be adduced is the positive identification of the vehicle after summary judgment had been entered against the defendant. The vehicle was recovered by the police sometime in March, 1988 and it was because of this recovery that the hearing of the O. 14 application was postponed twice, to enable both the police and the plaintiff to identify the vehicle recovered is the same as the one stolen.

However both the plaintiff and the police could not make any positive identification as all the identification marks on the vehicle had been tampered with.

It was against this background that the O. 14 application was heard and disposed of on 9 August 1988 when summary judgment for RM100,000 was entered against the defendant.

However, on 24 August 1988, the defendant employed the services of a forensic expert, Messrs Forensic Services (M) Sdn. Bhd. to investigate and determine whether the vehicle recovered is the same as the one stolen and on 12 September 1988, Forensic Services reported the vehicle to be so.

The facts leading to the positive identification of the vehicle is no way disputed by the plaintiff and neither is the report of Forensic Services challenged but nonetheless; they dispute the introduction of such evidence on the grounds that the defence of abatement which the defendant seek to plead consequent upon the allowance of such fresh evidence makes no difference to the outcome of the plaintiff's claim as the defendant had already admitted liability, the only issue being the quantum of damages the plaintiff are entitled to under the policy.

In any application for leave to adduce fresh evidence, the Court has an absolute discretion whether or not to grant such leave but the exercise of such a discretion is guided by the facts of each case and on the facts of the case before me the following conditions need to be fulfilled.

1) That the evidence sought to be adduced could not, with reasonable diligence, be obtained at the O. 14 application.

2) The fresh evidence will have an important bearing on the outcome of the case.

3) The fresh evidence is credible.

The plaintiff concede to condition (3) as the report of Forensic Services is concise as to leave no doubt as to the positive identification of the vehicle. There was also no strong objection to condition (2) as the introduction of the fresh evidence will have an important outcome of the case. It also enables the defendant to plead abatement as an alternative defence. But the plaintiff however took strong exception 'to condition (1) on the ground that the defendant had every opportunity during the 4 months period when the hearing of the O. 14 application was adjourned, to engage the services of Forensic Services. The fact that they had only done so, 2 weeks after summary judgment had been obtained against them, showed lack of diligence on their part and they should therefore not be granted leave.

From the affidavit evidence, it is clear that during the period of the 2 adjournments, the police and the plaintiff had tried to make a positive identification of the vehicle recovered. They were not able to do so as all the identification marks of the vehicle had been tampered with. It was only after that, that the services of the Forensic Services were sought by which time the O. 14 application had already been heard and disposed of.

Under such circumstances, I do not consider that the defendant had been in any way at fault for not seeking the services of Forensic Services any earlier than 24 August 1988, as both the police and the plaintiff had to be given every opportunity to make a positive identification of the vehicle - recovered. Their difficulties in doing so were aggravated by the fact that the recovered car had a different registration number, WAX 9587, the body number, chassis number and engine number, had all been tampered with. From the forensic report, the government chemist, no doubt called in by the Police to assist in the investigations was not even able to make any positive finding and it was only upon the thorough and expert investigations of Forensic Services that the identity of the recovered car was established. As the report of the Forensic Services has not been challenged by the plaintiff, on the contrary, its credibility and genuineness had been accepted by the plaintiff, this makes it all the more reasonable and fair that leave be granted to have the fresh evidence admitted.

As for the plaintiff's contention that the admission of such fresh evidence does not make any difference to their cause of action, as liability has been admitted by the defendant all along, I do not consider that the determination of this contention is material for the defendant's application for leave. So too is the plaintiff's contention that the admission of such evidence, the defendant are now able to plead abatement as an alternate defence. All that I am required to consider is whether on the facts of this case, it is just and equitable that the new evidence disclosed by the report of Forensic Services can be allowed after summary judgment had been entered against the defendant. Since on the facts of this case, I consider that it is just to do so, I had accordingly allowed the defendant's application with costs.

Dealing now with defendant's appeal against the O. 14 judgment, the first issue for determination is whether the policy is valued or unvalued policy.

A valued policy is one where the insurers at the time of the insuring, agree to the value of the property, the valuation being made by an expert, and it is this value that becomes the measure of indemnity if a loss occurs. In the proposal form dated 7 May 1986 which was signed by the plaintiff and which forms the basis of the contract, the figure of RM100,000 is stated to be the plaintiff's estimate of the value of the car at the time the contract was entered into, and apart from this, there is no evidence whether an expert had valued the vehicle at RM100,000 or that, that sum had also been agreed too by the defendant. That being the case, I rule that the policy is an unvalued policy and at most, the amount of indemnity the defendant had agreed to be bound should not exceed RM100,000. This is also clearly stated in cl. 2 of the policy as follows.

> "The insured's estimate of value stated in the Schedule shall be the maximum amount payable by the company in respect of any claim for loss or damage". That being the case, the measure of damages due under the policy in the event any loss or damage had occurred to the vehicle by theft, or the occurrence of any other events as specified in the policy, must be the value of the vehicle at the time of such loss or damage, such value not to exceed RM100,000.

Turning to the defence of abatement can it be said that the plaintiff's cause of action has been abated by the recovery and identification of the vehicle a year after it was stolen, thus entitling the plaintiff's claim to be dismissed? I answer this in the negative as there is no denying the fact that the risk for which the vehicle had been insured had happened. The vehicle was stolen on 23 February 1987 during the currency of the policy but fortunately or unfortunately for the plaintiff, the vehicle was recovered a year later. In this respect, the defendant cannot escape liability and must be held liable to the plaintiff for damages. However, the measure of such damages, bearing in mind that there was no total loss as the vehicle

had been recovered can no longer be the value of the vehicle at the time of its loss. By its recovery, the value of damages is governed by the second limb of cl. 2 of the policy which empowers the defendant to repair or reinstate or replace any parts or accessories stolen so that the car can be brought to its condition before it was stolen. To that end, I had allowed the appeal with costs to the extent that the defendant are only liable to meet all necessary costs to bring the vehicle into good repair and in the same condition as it was at the time of theft and for this purpose the services of an adjuster to be agreed upon by the parties shall be obtained and his assessment of costs shall be binding on both parties. The defendant are to meet the costs of employing such an adjuster.

Also found at [1989] 2 CLJ 504